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No. 79-621

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1980

STATE OF ARIZONA, PETITIONER

v.

WILLIAM DALE MANYPENNY

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT

REPLY BRIEF FOR THE STATE OF ARIZONA

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Reply Argument I	1
THE TENTH AMENDMENT PROVIDES A JURISDICTIONAL BASIS FOR THIS APPEAL	1
Reply Argument II	8
"COMMON LAW" PRINCIPLES FAVOR PETITIONER'S APPEAL	8
Reply Argument III	14
ARIZONA LAW PROVIDES FOR APPELLATE REVIEW OF THE TRIAL COURT'S ORDER IN THE INSTANT CASE.	14
Conclusion	17
Appendix I	18
Letter From Attorney General of California (dated June 9, 1980) authorizing Petitioner to represent to the Court that the State of California supports Petitioner as to the first issue before this Court	19

TABLE OF AUTHORITIES

Cases	Page
Bartkus v. Illinois, 359 U.S. 121	7
Bushell's Case, Vaughan 135, Eng.Rep. 1006	10
Collins v. United Mine Workers of America Welfare and Retirement Fund of 1950, 298 F.Supp. 964.	9
Colorado v. Symes, 286 U.S. 510	11
Davis v. Passman, 442 U.S. 228	1
Elias v. Pasmore, 2 K.B. 164	12
Elrod v. Burns, 427 U.S. 347 (dissenting opinion of Chief Justice Burger)	6, 7
Florida Trailer and Equipment Company v. Deal, 284 F.2d 567	9
Funk v. United States, 290 U.S. 371	8
Glidden Co. v. Zdanok, 370 U.S. 530, (dissenting opinion of Justices Douglas and Black).	10
Miller v. Monsen, 37 N.W.2d 543 (Supreme Court of Minnesota)	8, 11

8345

Cases	Page
O'Donoghue v. United States, 299 U.S. 516	10
Richmond Newspapers, Inc. v. Virginia, ____ U.S. ____, 100 S.Ct. 2814 . . .	1, 2 11, 13
State v. Fayle, 114 Ariz. 219, 560 P.2d 403.	15
State v. Gradillas, 25 Ariz.App. 510, 544 P.2d 1111. . .	14
State v. Lopez, 26 Ariz.App. 559, 550 P.2d 113 . . .	15
Tennessee v. Davis, 100 U.S. 257	11
United States v. Schoenfield, 465 F.2d 560, cert.denied 93 S.Ct. 210.	9
Wolf v. Colorado, 338 U.S. 25.	12
UNITED STATES CONSTITUTION	
Article I, Section III	7
Article II, Section I (superseded by the Twelfth Amendment).	7
Article III.	10
Fourth Amendment	1

837

	Page
Fifth Amendment	1
Eighth Amendment	1
Tenth Amendment	passim
Twelfth Amendment	7
UNITED STATES STATUTES	
18 U.S.C. 3731	6
ARIZONA RULES	
Rule I of the Rules of Procedure For Special Actions (found in Volume 17A of Arizona Revised Statutes)	15
MISCELLANEOUS	
Articles of Confederation	2, 3
The Bible Proverbs § 24, Line 24	13
The Bill of Rights	1
The Declaration of Independence	10
The Federalist, edited by Jacob E. Cooke, Wesleyan University Press(1961)	4
The Federalist, No. 17 (Hamilton)	5, 7
The Federalist, No. 31 (Hamilton)	4
The Federalist, No. 32 (Hamilton)	5

	Page
The Federalist, No. 39 (Madison) . .	5
The Federalist, No. 45 (Madison) . .	5
The Federalist, No. 78 (Hamilton). .	10
The Federalist, No. 79 (Hamilton). .	10
The Federalist, No. 84 (Hamilton). .	5
Brant, The Bill of Rights, Its Origins and Meanings, Bobbs, Merrill and Company (1965)	11
Morison, The Oxford History of the American People, Mentor Edition 1972, Volume 1, pages 399-400. . . .	7
Schwartz, The Bill of Rights; A Documentary History, Chelsea House Publishers (1971).	4
Shakespeare, Measure for Measure, Act II, Scene II, lines 175-176. . .	13

I.

THE TENTH AMENDMENT PROVIDES A JURISDICTIONAL BASIS FOR THIS APPEAL

Respondent on pages 45 through 50 of his brief argues that the Tenth Amendment has no application to this case. Respondent does not explain why this Court cannot imply a remedy under the Tenth Amendment, as it has implied remedies under the Fourth, Fifth (Davis v. Passman, 442 U.S. 228 (1979) at 241, 242) and Eighth Amendments. Respondent apparently contends that the absence of explicit language in the Tenth Amendment authorizing such an appeal by a state precludes the use of the Tenth Amendment as the jurisdictional basis of an implied remedy. Respondent's niggardly reading of the Bill of Rights was most recently rejected by the Court in Chief Justice Burger's opinion in the Richmond Newspapers Inc. v. Virginia case ____ U.S. ____100 S.Ct. 2814 (1980) at 2828-2829.

> ". . .The concerns expressed by Madison and others have thus been resolved; fundamental rights, even though not expressly guaranteed have been recognized by the Court as indispensable to the enjoyment of rights explicitly defined." 100 S.Ct. at 2829.

While there has been relatively little litigation involving the Tenth Amendment, an examination of Constitutional history shows that the Founding Fathers considered the reserved powers doctrine of vital importance to our Constitutional scheme.

Under the Articles of Confederation, the "reserved powers" of the States were seen to embody the whole subject of individual rights. This was made explicit by Article II of the Articles, which provided "Each State retains. . . every power, jurisdiction, and right which is not by this confederation expressly delegated to the United States." This was the

direct precursor of the Tenth Amendment, and was seen as the main bulwark against centralized despotism.[1]

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1. Even when the government system under the Articles began to prove untenable, and a stronger federalism was urged, the reserved powers doctrine retained its pivotal position on the issues of individual freedom and state sovereignty. It was the reserved powers doctrine which proved to be the much needed common ground in the struggle over the Constitution; nearly every anti-federalist writer attacked the absence of a Bill of Rights, specifically rejecting the federalist premise that what rights were not given to the federal government were impliedly reserved to the States. Anti-federalist rejection of this premise lead directly to the adoption of the Tenth Amendment, closely parallelling the old Article II, and soothing anti-federalist fears.

The importance of the reserved powers doctrine to the Founding Fathers is underscored by its treatment by the states. The doctrine was the first of the Twelve Amendments to the Constitution proposed by Massachusetts, the first State to officially propose amendments. It was the first amendment submitted to the Maryland ratifying convention. It was the

(8370

Repeated references to State Sovereignty in the Federalist Papers ineluctably lead to the conclusion that the view of State sovereignty held by the majority in the Ninth Circuit, that the States possess only those rights that Congress deigns to give them, (Pet.App. at 11a) is completely repugnant to the conception of State sovereignty and Federalism held by the Founding Fathers. (All the following quotations are from The Federalist edited by Jacob E. Cooke, Wesleyan University Press, Connecticut 1961.)

> "The State governments by their original constitutions, are invested with complete sovereignty." Federalist No. 31, (Hamilton) pg. 197-198.

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first of the proposed Virginia Amendments. Indeed, every one of the eight States which proposed, either officially or unofficially, amendments to the Constitution, recommended a provision like that ultimately included in the Tenth Amendment, reserving to the States powers not specifically delegated to the Federal Government. See, The Bill of Rights: a Documentary History, by Bernard Schwartz, Chelsea House Publishers, 1971 at 384-5, 505, 674-766, 983.

". . .the State Governments would clearly retain all the rights of sovereignty which they before had and which were not by that act exclusively delegated to the United States." The Federalist No. 32 (Hamilton), pg. 200.

"There is one transcendent advantage belonging to the province of the State governments which alone suffices to place the matter in a clear and satisfactory light. I mean the ordinary administration of criminal and civil justice. This of all others is the most powerful, most universal and most attractive source of popular obedience and attachment." The Federalist No. 17 (Hamilton), pg. 105.

". . .Here, in strictness, the people surrender nothing, and as they retain every thing, they have no need of particular reservations." The Federalist No. 84 (Hamilton), pg. 578. See also, The Federalist Nos. 39 and 45 (Madison).

Petitioner submits, especially in light of the history of colonial hatred for Great Britian's "removal bill" (please see pages 44-47 and 95-96 of Petitioner's opening brief)

§3731

that the majority opinion in the Ninth Circuit in this case would certainly be viewed as antithetical to the Constitution by those who drafted it.

As discussed on pages 37-48 of Petitioner's opening brief, Congress did not intend to preclude appeals by States in removal prosecutions when it enacted 18 U.S.C. 3731. It is Petitioner's position that even if Congress had included a specific subsection explicitly prohibiting the States from using 18 U.S.C. 3731 for appeals in removal cases, such a restriction would be an unconstitutional nullity because of the Tenth Amendment.

If the Court is to "arrest the downgrading of States to a role comparable to the departments of France, governed entirely out of the national capital." (Chief Justice Burger dissenting in Elrod v. Burns, 427 U.S. 347 (1976), at 375) the majority ruling must be

reversed.[2] See also, opinion of Justice Frankfurter in Bartkus v. Illinois, 359 U.S. 121 (1959) at 137.

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2. That the 50 States are to be treated as sovereign political entities is best illustrated by Article II, Section I (superseded by the XII Amendment). It provides that if no presidential candidate wins an outright majority of the electoral votes cast, the House of Representatives shall choose the president, with each of the 50 States to have one vote, irrespective of population. At the time Article II, Section I was adopted, the "two party system" was unforseen and it was assumed that most presidential elections would be decided in the House. See, Morison, The Oxford History of the American People, Mentor edition 1972, Volume I, pages 399-400. C.F. Article I, Section III.

857

II.

"COMMON LAW" PRINCIPLES FAVOR PETITIONER'S APPEAL.

On pages 32 et seq. of his brief, Respondent contends that because English "common law" did not look favorably on appeals by the sovereign in criminal cases, the Ninth Circuit had no jurisdiction to consider the appeal by the instant Petitioner. Respondent misconstrues the nature of the "common law". The "common law" is not graven in stone like the Ten Commandments, it is flexible and has a capacity for growth and change. See, Funk v. United States, 290 U.S. 371 (1933) at 383. The Minnesota Supreme Court wrote in Miller v. Monsen, 37 N.W.2d 543 (1949):

> "Novelty of an asserted right and lack of common-law precedent therefor are no reasons for denying its existence. The common law does not consist of absolute, fixed and inflexible rules, but rather of broad and

> comprehensive principles based on justice, reason, and common sense. It is of judicial origin and promulgation." at page 547.

See also, Florida Trailer and Equipment Company v. Deal, 284 F.2d 567 (5th Circuit, 1960); Collins v. United Mine Workers of America Welfare and Retirement Fund of 1950, 298 F.Supp. 964 (United States District Court for District of Columbia, 1969, affirmed 439 F.2d 494) (quoting Justice Cardozo).

It is immaterial that the instant case is a criminal case rather than a civil case:

> "More significantly, common law doctrines are not frozen for criminal cases any more than civil cases." United States v. Schoenfield, 465 F.2d 560 at 561 cert.denied, 93 S.Ct. 210 (D.C. Cir. 1972).

Moreover, as noted in Petitioner's opening brief at pages 53-54, 47 of the 50 States allow for appeals by the government in criminal

cases, so the "common law" doctrine disfavoring appeals by the sovereign on which Respondent relies clearly has no continuing vitality in the United States.[3]

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3. Respondent's contention that the appellate rights of the State of Arizona in a removal prosecution should be governed by the appellate rights of the English sovereign at common law is even more questionable when one considers the differences in our respective legal systems. English judges did not enjoy the Article III protections that guarantee the independence of our federal judges. Indeed, another enumerated grievance in the Declaration of Independence was: "He has made Judges dependent on his will alone, for the tenure of their offices, and the amount and payment of their salaries." This portion of the Declaration of Independence, as well as Hamilton's Federalist No. 78 and 79, was quoted by the Court when it discussed the importance of the Article III guarantees in maintaining an independent judiciary in O'Donoghue v. United States, 289 U.S. 516 (1933) at 530-533. See also dissenting opinion of Justices Douglas and Black in Glidden Company v. Zdanok, 370 U.S. 530 (1962) at 594-596, quoting Federalist No. 79. In addition to the English sovereign having more influence over the English judiciary, prior to the decision in Bushell's Case in 1670, (Vaughan 135, 124 Eng.Rep. 1006), it was a common practice under Tudor and Stuart monarchs

Petitioner asserts that if this case is to be decided on "common law" principles, than "justice, reason and common sense" (Miller v. Monson, supra) dictate that the Court not divest the States of their right to appeal in a removal prosecution. Allowing for an appeal by the States in removal cases would be consistent with the principles set forth by the Court in Tennessee v. Davis, 100 U.S. 257 (1880) and Colorado v. Symes, 286 U.S. 510 (1932). (Both discussed in Petitioner's opening brief). Further support for Petitioner's position is found in the Court's recent decision in Richmond Newspapers, Inc. v. Virginia, supra. Petitioner submits that all

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to lock up jurors who refused to return a verdict of guilty. See The Bill of Rights, Its Origins and Meanings, by Irving Brant, Bobbs, Merrill & Company, 1965, pg. 61. Moreover, the "exclusionary rule" which forms the basis for a great many government appeals by the Federal Government and various State

of the public policy considerations[4] enumerated by Chief Justice Burger at 100 S.Ct. 2824-26 and Justices Brennan and Marshall in their concurring opinion at 100 S.Ct. 2837-8 that militate in favor of opening the justice system to public scrutiny are equally applicable to the issue of whether a federal district judge should be vested with the unreviewable power to in essence "pardon" any federal official charged with a violation of a State criminal statute.

Petitioner submits that it is hard to think up a rule of law more calculated to subvert the social values enumerated by the

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governments, did not and does not exist in England. See, Wolf v. Colorado, 338 U.S. 25 (1949) Appendix Table J at 39, citing Elias v. Pasmore (1934) 2 K.B. 164.

4. ". . .To work effectively, it is important that society's criminal process 'satisfy the appearance of justice.'" 100 S.Ct. at 2825.

* * *

Court in support of the Richmond decision, than the rule of special privilege established by the majority in the Ninth Circuit.

Open trials assure the public that procedural rights are respected, and that justice is afforded equally. Closed trials breed suspicion of prejudice and arbitrariness, which in turn spawns disrespect for law. 100 S.Ct. at 2837. See also, Shakespeare's, Measure for Measure, Act II, Scene II, soliloquy of Angelo the Magistrate at lines 175-176; Proverbs, § 24, line 24.

III.

ARIZONA LAW PROVIDES FOR APPELLATE REVIEW OF THE TRIAL COURT'S ORDER IN THE INSTANT CASE.

On pages 17 through 20 of his brief, Respondent contends that had Respondent not exercised his right of removal, the State of Arizona could not have sought appellate review of a similar ruling by an Arizona trial judge. Respondent omits any discussion of the case cited by Petitioner in its opening brief, (footnote 2 at pg. 34) and cases cited by Judge Kennedy in his dissent. (Pet.App. 23a, 38a). In those cases, Arizona appellate courts have granted appellate relief via Petition For Special Action when a trial court has improperly entered a judgment of acquittal. See also, State v. Gradillas, 25 Ariz.App. 510, 544 P.2d 1111 (1976) where the State successfully appealed from the granting of both a motion to suppress evidence and a judgment of acquittal.

The Arizona Court of Appeals opinion in State v. Lopez, 26 Ariz.App. 559, 550 P.2d 113 (1976) (majority opinion specifically approved by the Arizona Supreme Court in State v. Fayle, 114 Ariz. 219, 560 P.2d 403 (1976)) on which Respondent relies, specifically rejects Respondent's position.

> "This case, as well as State ex rel Berger v. Superior Court, 111 Ariz. 335, 529 P.2d 686 (1974) indicates that review of an order such as that involved here is available to the State by special action, and, in fact, the non-appealability of the order and the availability of special action proceedings may result in much speedier review of such an order than by means of appeal." 550 P.2d at 115.

Rule 1 of the Rules of Procedure For Special Actions provides that "the special action shall not be available where there is an equally plain, speedy, and adequate remedy by appeal;" (found in Volume 17A, Arizona Revised Statutes, pg. 227-8). That Arizona

denominates appellate review of certain types of orders "appeals" and denominates review of other trial orders "special actions" does not change the reality that in Arizona the trial court's rulings are subject to review by the Arizona appellate courts at the behest of the State.

CONCLUSION

For the reasons set forth in this brief and Petitioner's opening brief, the Court should reinstate the jury's guilty verdict and remand the instant case to the Federal District Court for sentencing.

Respectfully submitted this 2nd day of October, 1980.

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8348

APPENDIX

State of California
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June 9, 1980

Honorable Stephen D. Neely
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Attention: D. Jessie Smith
Deputy County Attorney

Re: State of Arizona v. Manypenny
U.S.S.C. No. 79-621

Dear Sir:

You are authorized to represent to the United States Supreme Court that the State of California Supports the position of the State of Arizona on Question I, presented on the Petition in the above entitled case, that the state is not deprived of appellate rights that exist under federal and state law when a state criminal prosecution is removed by a defendant to a federal court pursuant to 28 U.S.C., section 1442(a)(1), and that California joins in Arizona's request that the judgment of the Court of Appeals for the Ninth Circuit, holding to the contrary, be reversed.

A copy of this letter has this date been forwarded to the Honorable Michael Rodak, Clerk of the United States Supreme Court.

Sincerely yours,

George Deukmejian, Attorney General

By William E. James
William E. James
Sr. Assistant Attorney General

WEJ:jd

cc: Honorable Michael Rodak